

87TH CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
2d Session } No. 1748

BACK PAY ACT OF 1962

MAY 31, 1962.—Committed to the Committee of the Whole House on the State
of the Union and ordered to be printed

Mr. OLSEN, from the Committee on Post Office and Civil Service,
submitted the following

R E P O R T

[To accompany H.R. 11753]

The Committee on Post Office and Civil Service, to whom was referred the bill (H.R. 11753) to provide for the payment of certain amounts and restoration of employment benefits to certain Government officers and employees improperly deprived thereof, and for other purposes, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

PURPOSE

The purpose of this legislation is to establish a uniform, general, and equitable principle of backpay to be followed by all Federal agencies in restoring to any employee pay and other benefits which he may have lost because of an unjustified or unwarranted personnel action that is later corrected by appropriate authority. This principle holds that a Federal employee involved in such actions should be made whole financially. The legislation does not create any new rights of tenure, review, or appeal.

STATEMENT

It is the general purpose of this bill, which is based upon an official request of the U.S. Civil Service Commission, to revise, consolidate, and apply on a more uniform basis those provisions of existing law which provide for payment of compensation, in cases of the improper removal or suspension of an employee of the Government, for the period of such improper removal or suspension. The provisions of existing law covering the granting of such backpay are section 6(b) of the act of August 24, 1912, as amended (5 U.S.C. 652(b)), and a

portion of the third proviso of the first section of the act of August 26, 1950, as amended (5 U.S.C. 22-1).

The bill revises and extends existing law (sec. 6 of the act of August 24, 1912, and the act of August 26, 1950) as follows:

First, the bill covers all officers and employees of the executive branch of the Federal Government as well as officers and employees of the Administrative Office of the U.S. Courts, the Library of Congress, the General Accounting Office, the Government Printing Office, the Office of the Architect of the Capitol, the Botanic Garden, and the municipal government of the District of Columbia.

Second, the bill provides that, in those cases in which a right of appeal is specifically granted by law or regulation, or in which Government authority on its own initiative has discovered the necessity of correcting an improper personnel action, corrective action shall be taken which, to the extent practicable, restores to the officer or employee concerned his compensation and other employment rights and benefits on a retroactive basis.

Third, the bill expands the personnel actions covered by existing law (i.e., unjustified or unwarranted removals and suspensions) to cover any other unjustified or unwarranted personnel action as well as unjustified or unwarranted removals and suspensions.

It may be noted that the bill does not change the procedural requirements of any system of appeals within the Government and that it does not require by its terms a Government agency to review a personnel action.

EXPLANATION OF THE BILL BY SECTIONS

The first section of the bill provides a short title for the proposed back pay law—the Back Pay Act of 1962.

Section 2 of the bill (together with the references to officers and employees in sec. 3) provides for the coverage of the bill by defining the term "agency" to cover those Government agencies set forth above in this explanation.

Section 3 of the bill literally provides that each civilian officer or employee of an agency who, on the basis of an administrative determination or a timely appeal, is found by appropriate authority under applicable law or regulation to have undergone an unjustified or unwarranted personnel action taken on or after the date of enactment of this act, which has resulted in the withdrawal or reduction of all or any part of the pay, allowances, or differentials of such officer or employee—

(1) shall be entitled, upon correction of such personnel action, to receive for the period for which such personnel action was in effect an amount commensurate with the amount of all or any part of the pay, allowances, or differentials, as applicable, which such officer or employee normally would have earned during such period if such personnel action had not occurred, less any amounts earned by him through other employment during such period; and

(2) for all purposes, shall be held and considered to have rendered service for such agency during such period, except that such officer or employee shall not be credited, by reason of the enactment of this act, leave in an amount which would cause any

amount of leave to his credit to exceed any maximum amount of such leave authorized for such officer or employee by law or regulation.

The following observations may be made about section 3 of the bill:

(1) Section 3 covers each civilian officer or employee of an agency (as defined in sec. 2) whether in the competitive civil service, in the excepted service, or elsewhere.

(2) It is intended that the words "administrative determination," as used in section 3, be held and considered to refer to a decision made by appropriate Government authority on its own initiative. It is not intended that such words be held and considered to refer to a decision which the appropriate Government authority has been required to make in order to act upon a formal appeal. One effect of the use of the words "administrative determination" is to grant to a Government agency the right and opportunity, at its option, to rectify injustices, which come to its attention, in connection with backpay in cases of unjustified or unwarranted personnel actions. It is hoped that this factor of administrative determination will be especially remedial in those cases in which no appeal is available to the officer or employee concerned.

(3) The use of the words "timely appeal" continues in the backpay law the concepts, policies, and practices of other laws, now or hereafter enacted, relating to Government employee appeals, and the concepts, policies, and practices of the regulations under such laws. The words "timely appeal" refer to an appeal which is properly made to a Government agency or to the U.S. Civil Service Commission and which seeks reconsideration of an official personnel action affecting an officer or employee adversely. This appeal will be initiated by the officer or employee or his representative under an appeals system or procedure established by law or regulation. This appeal must have been accepted as a timely appeal by the Government authority administering the appeals system or procedure concerned. The words "timely appeal", as used in section 3, are not intended to create any new concept of timeliness.

(4) The use of the words "unjustified or unwarranted personnel action" incorporates into the proposed new backpay law the same concepts regarding such words as used in the proposed new law as were developed in the administration and application of section 6 of the act of August 24, 1912, in connection with such words. The interpretation of the phrase "unjustified or unwarranted" with reference to adverse personnel actions in the administration of section 6 of the act of August 24, 1912, covers both equitable and procedural considerations. This interpretation follows the decisions of the U.S. Court of Claims in the cases of *Stringer v. United States* (117 Court of Claims 30) and *Garcia v. United States* (123 Court of Claims 722) and follows the ruling of the Comptroller General of the United States contained in 34 Comptroller General 568.

(5) The words "appropriate authority" are intended to refer to the agency, office, or official authorized under applicable law or regulation to correct, or to direct the correction of, the unjustified or unwarranted personnel action. In some instances, this "appropriate authority" is the U.S. Civil Service Commission. In other instances, such authority is found at a certain level of agency management as defined in applicable regulations and delegations of authority thereunder.

(6) The words "under applicable law or regulation," in connection with a finding made by appropriate authority under applicable law or regulation, are intended to cover those laws and regulations, now or hereafter in effect, which provide the basis for operations under the Government personnel systems. The backpay provisions of section 3 of the bill will operate on the basis of these laws and regulations, now or hereafter in effect. Such laws and regulations will provide means and procedures for the reconsideration of unjustified or unwarranted personnel actions, provide the legal basis for taking proper personnel actions and for correcting unjustified or unwarranted personnel actions, and establish the places where the authority is found to correct improper personnel actions.

(7) Neither section 3 nor any other provision of the bill attempts to define the words "personnel action" or to enumerate the kinds of "personnel actions" covered by the bill. Any unjustified or unwarranted personnel action—that is, a personnel action taken with impropriety—is within the purview of the bill. However, it is anticipated that these actions will consist of unjustified or unwarranted separations (including retirements), suspensions, and demotions in most cases.

(8) As in the case of the words "personnel action," no attempt is made to define or enumerate the specific types of corrective action which may be taken with respect to the correction of unjustified or unwarranted personnel actions. The phrase "upon correction of such personnel action" is incorporated in section 3 of the bill to insure that the appropriate administrative action (whatever it might be consistent with applicable laws and regulations) is taken before an entitlement to backpay is created.

(9) It is important to note that section 3 of the bill establishes an entitlement to backpay in each case in which a personnel action (which has terminated or decreased the pay, allowances, or differentials of an officer or employee) subsequently is found by appropriate authority to be unjustified or unwarranted and is corrected by or through appropriate authority. This entitlement to backpay, allowances, or differentials is dependent upon the occurrence of the following situations:

(A) An official personnel action has been taken which terminated or decreased all or part of the pay, allowances, or differentials of a Government officer or employee.

(B) Such personnel action has been made the subject of review by appropriate authority, either because of a timely appeal on the part of such officer or employee or because the appropriate Government authority, on its own initiative, decided to review such personnel action.

(C) Such personnel action has been found by the appropriate Government authority to be unjustified or unwarranted.

(D) A corrective action, consistent with applicable laws or regulations, has been authorized by the appropriate Government authority as a consequence of its decision.

(10) Section 3 of the bill, in effect, establishes and applies, as nearly as practicable on a uniform basis, the principle that a Government officer or employee should be made whole following the correction of an unjustified or unwarranted personnel action. The committee is informed that regulations promulgated under the bill will define

in detail the extent of the adjustment in the pay, allowances, or differentials of such officer or employee following correction of an unjustified or unwarranted personnel action. This adjustment will cover everything to which such officer or employee normally would have been entitled if the personnel action had not occurred. It is anticipated that the regulations will provide that such adjustment shall take into account those occurrences which affect the amount of pay, allowances, or differentials to which such officer or employee is entitled. Occurrences which will operate to reduce such amount include, for example, death before final adjudication of an appeal, separation or furlough as a result of a reduction in force, transfer from one agency to another agency, and imprisonment for crime. Section 3 of the bill does, however, assure credit for certain increments which operate to increase such amount. These increments include, for example, periodic within-grade increases and general pay increases to which the officer or employee would have been entitled if the unjustified or unwarranted personnel action had not occurred.

Section 6 of the act of August 24, 1912, and the first section of the act of August 26, 1950, prevent the crediting of these increments in computing the amount of backpay. On the other hand, under current interpretation, such provisions of law are held and considered to include in a backpay computation the premium pay which an employee normally would have earned. In order to preserve this interpretation, section 3 of the bill retains the phrase "normally would have earned," which appears in such act of August 26, 1950, and which is the subject of an interpretation by the Comptroller General of the United States in 34 Comptroller General 382.

(11) Section 3 of the bill provides that the amount of backpay to which an officer or employee is entitled shall be reduced by whatever amount the officer or employee earned through other employment during the period the unjustified or unwarranted personnel action was in effect. The U.S. Court of Claims and the Comptroller General of the United States interpreted the words "other employment" as covering only that employment engaged in by the officer or employee to take the place of the employment which the officer or employee had prior to the unjustified or unwarranted personnel action. This interpretation was discussed by the U.S. Court of Claims in the case of *Jackson v. United States* (121 Court of Claims 405) and by the Comptroller General of the United States in 32 Comptroller General 408. In effect, if an employee had been separated from his position, the amount of his entitlement would be the difference between the amount his Government income should have been and the amount which he actually earned in an employment obtained to take the place of his Government employment. If the officer or employee had been demoted, the amount to which he would be entitled would be the difference between the amount his income should have been in the proper grade and the amount of his income at the lower grade.

(12) Section 3 of the bill provides, in effect, that for all purposes the officer or employee shall be held and considered to have rendered service during the period of the unjustified or unwarranted personnel action. The words "for all purposes" are intended to provide for the complete restoration of seniority, service credit toward retirement, group life insurance, group health insurance, and all other benefits of employment which may have been affected by the unjustified or

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unwarranted personnel action. This result is consistent with the current Government administration of those matters following a court of U.S. Civil Service Commission restoration order. In addition, leave accumulation, excluded specifically from the backpay provisions of section 6 of the act of August 24, 1912, is authorized uniformly by section 3 of the bill in accordance with the precedent of the more recent act of August 26, 1950. However, the usual ceilings on leave accumulation will be observed, as prescribed by the law or regulation covering the leave system to which the officer or employee is subject.

Section 4 of the bill authorizes the U.S. Civil Service Commission to prescribe regulations to carry out the provisions of the bill.

Section 5(a) of the bill repeals the so-called backpay provisions of section 6 of the act of August 24, 1912, and the first section of the act of August 26, 1950.

Section 5(b) of the bill provides that, notwithstanding the repeal of certain provisions of law by section 5(a) of the bill, the provisions of law so repealed will continue to have full force and effect with respect to unjustified or unwarranted personnel actions taken prior to the date of enactment of the bill.

HEARINGS

Hearings were held on this legislation at which favorable testimony was received from the Chairman of the U.S. Civil Service Commission and representatives of the major employee organizations. The committee knows of no opposition to the measure.

COST

A precise statement of the cost of this proposal is not available without an extensive and detailed study going into the experience of each Federal agency. However, with the facts which are available, it is estimated that less than \$400,000 per year in additional cost would be involved Government-wide, and that most of these costs would be of the type which agencies customarily absorb in the normal course of operations.

AGENCY REQUEST

The official request of the U.S. Civil Service Commission for enactment of this legislation follows:

U.S. CIVIL SERVICE COMMISSION,
Washington, D.C., September 8, 1961.

Hon. SAM RAYBURN,
Speaker of the House of Representatives.

DEAR MR. SPEAKER: We are submitting for the consideration of Congress proposed legislation to establish one general and equitable principle to be followed by all Federal agencies in restoring to their employees pay and other benefits of employment which are lost by reason of an unjustified or unwarranted personnel action subsequently corrected by appropriate authority. There are enclosed: (1) a draft bill; (2) a section analysis of the proposed bill; and (3) a statement of purpose and justification.

The proposed bill presents one comprehensive and uniform authority for backpay entitlement and computation to replace the three current

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authorities, because these authorities are neither comprehensive nor uniform in their application. Specifically the bill is intended to supersede the pay provisions of Public Law 80-623 and Public Law 81-733. In addition this bill provides a more specific legislative foundation for the Civil Service Commission's authority in this area now exercised under section 19 of the Veterans Preference Act.

In brief, the proposed bill enables appropriate authority following an administrative determination or timely appeal to pay an employee who has had his compensation terminated or reduced because of an unjustified or unwarranted personnel action the difference between what he earned and what he should have earned for the period. No entitlement is created, however, without a finding by appropriate authority that the action was indeed unjustified or unwarranted and a determination by such authority to take corrective action.

As amplified in the attached statement of purpose and justification, the proposed bill extends backpay protection to certain employees and situations not covered by present authorities. Significantly the proposed bill does not extend to any employee any rights of tenure, review, or appeal to which he is not otherwise entitled. It does require, however, that where an employee has a right to seek corrective action through administrative proceedings, and is successful in doing so, he will for pay, employment benefit, and other purposes be deemed to have rendered service at his proper grade during the period. Moreover the proposal would strengthen the powers of agencies in making equitable pay and benefit adjustments following the correction of unjustified or unwarranted personnel actions which they decide to correct on their own initiative.

Timely processing of appeals should minimize individual retroactive payments. The cases which would be covered should continue to be largely those which are already covered by one or the other of the present authorities covering backpay. While it is not anticipated that the additional costs involved would be great, however, the principle which this bill would establish is an important one. For this reason it is hoped that the Congress will be able to act favorably on this legislation as soon as circumstances permit.

The Bureau of the Budget advises that from the standpoint of the administration's program there would be no objection to the submission of this proposal.

By direction of the Commission:

Sincerely yours,

(S) JOHN W. MACY, Jr.,
Chairman.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, existing law in which no change is proposed is shown in roman):

SECTION 6(b) OF THE ACT OF AUGUST 24, 1912 (5 U.S.C. 652(b))

[(b) (1) Any person removed or suspended without pay under subsection (a) who, after filing a written answer to the charges as

provided under such subsection or after any further appeal to proper authority after receipt of an adverse decision on the answer, is reinstated or restored to duty on the ground that such removal or suspension was unjustified or unwarranted, shall be paid compensation at the rate received on the date of such removal or suspension, for the period for which he received no compensation with respect to the position from which he was removed or suspended, less any amounts earned by him through other employment during such period, and shall for all purposes except the accumulation of leave be deemed to have rendered service during such period. A decision with respect to any appeal to proper authority under this paragraph shall be made at the earliest practicable date.

[(2) Any person who is discharged, suspended, or furloughed without pay, under section 14 of the Veterans' Preference Act of 1944, as amended, who, after answering the reasons advanced for such discharge, suspension, or furlough or after an appeal to the Civil Service Commission, as provided under such section, is reinstated or restored to duty on the ground that such discharge, suspension, or furlough was unjustified or unwarranted, shall be paid compensation at the rate received on the date of such discharge, suspension, or furlough for the period for which he received no compensation with respect to the position from which he was discharged, suspended, or furloughed, less any amounts earned by him through other employment during such period, and shall for all purposes except the accumulation of leave be deemed to have rendered service during such period.]

[(3) Any person removed or suspended without pay in a reduction in force who, after an appeal to proper authority, is reinstated or restored to duty on the ground that such removal or suspension was unjustified or unwarranted shall be paid compensation at the rate received on the date of such removal or suspension, for the period for which he received no compensation with respect to the position from which he was removed or suspended, less any amounts earned by him through other employment during such period, and shall for all purposes except the accumulation of leave be deemed to have rendered service during such period. A decision with respect to any appeal to proper authority under this paragraph shall be made at the earliest practicable date.]

THE FIRST SECTION OF THE ACT OF AUGUST 26, 1950
(5 U.S.C. 22-1)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, notwithstanding the provisions of section 6 of the Act of August 24, 1912 (37 Stat. 555), as amended (5 U.S.C. 652), or the provisions of any other law, the Secretary of State; Secretary of Commerce; Attorney General; the Secretary of Defense; the Secretary of the Army; the Secretary of the Navy; the Secretary of the Air Force; the Secretary of the Treasury; Atomic Energy Commission; the Chairman, National Security Resources Board; or the Administrator of the National Aeronautics and Space Administration, may, in his absolute discretion and when deemed necessary in the interest of national security, suspend, without pay, any civilian officer or employee of the Department

of State (including the Foreign Service of the United States), Department of Commerce, Department of Justice, Department of Defense, Department of the Army, Department of the Navy, Department of the Air Force, Coast Guard, Atomic Energy Commission, National Security Resources Board, or National Aeronautics and Space Administration, respectively, or of their several field services; *Provided*, That to the extent that such agency head determines that the interests of the national security permit, the employee concerned shall be notified of the reasons for his suspension and within thirty days after such notification any such person shall have an opportunity to submit any statements or affidavits to the official designated by the head of the agency concerned to show why he should be reinstated or restored to duty. The agency head concerned may, following such investigation and review as he deems necessary, terminate the employment of such suspended civilian officer or employee whenever he shall determine such termination necessary or advisable in the interest of the national security of the United States, and such determination by the agency head concerned shall be conclusive and final: *Provided further*, That any employee having a permanent or indefinite appointment, and having completed his probationary or trial period, who is a citizen of the United States whose employment is suspended under the authority of this Act, shall be given after his suspension and before his employment is terminated under the authority of this Act, (1) a written statement within thirty days after his suspension of the charges against him, which shall be subject to amendment within thirty days thereafter and which shall be stated as specifically as security considerations permit; (2) an opportunity within thirty days thereafter (plus an additional thirty days if the charges are amended) to answer such charges and to submit affidavits; (3) a hearing, at the employee's request, by a duly constituted agency authority for this purpose; (4) a review of his case by the agency head, or some official designated by him, before a decision adverse to the employee is made final; and (5) a written statement of the decision of the agency head: *Provided further*, That any person whose employment is so suspended or terminated under the authority of this Act may, in the discretion of the agency head concerned, be reinstated or restored to duty [redacted], and if so reinstated or restored shall be allowed compensation for all or any part of the period of such suspension or termination in an amount not to exceed the difference between the amount such person would normally have earned during the period of such suspension or termination, at the rate he was receiving on the date of suspension or termination, as appropriate, and the interim net earnings of such person [redacted]: *Provided further*, That the termination of employment herein provided shall not affect the right of such officer or employee to seek or accept employment in any other department or agency of the Government: *Provided further*, That the head of any department or agency considering the appointment of any person whose employment has been terminated under the provisions of this Act may make such appointment only after consultation with the Civil Service Commission, which agency shall have the authority at the written request of either the head of such agency or such employee to determine whether any such person is eligible for employment by any other agency or department of the Government.

